

May 21, 1999

The Honorable Michael B. Enzi
Chairman
Subcommittee on Employment, Safety and Training
United States Senate
607 Hart
Washington, D.C. 20510

Dear Chairman Enzi:

This is in response to your request for my views on whether the Regulatory Flexibility Act (RFA) should be amended to include the Mine Safety and Health Administration (MSHA) in the list of Agencies subject to the Small Business Advocacy Review Panel Process. This process was created by the Small Business Regulatory Enforcement and Fairness Act (SBREFA), as an amendment to the RFA. The Panel process requirement for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) has provided new leverage in our efforts to change the regulatory culture of these two Federal agencies.

The requirement that MSHA convene a small business advocacy review panel prior to the publication of a proposed rule that will have an significant impact on small entities, allows small entities to provide important input at a critical point in the development of a Federal regulation. We continue to find that agencies are more likely to minimize the burden on small entities while meeting their regulatory objectives if they involve small businesses and the Office of Advocacy early in the rulemaking process.

Of equal importance is the information gleaned by the panels and their enhancement of the decision making process. Fourteen (14) panels at the Environmental Protection Agency (EPA) and (3) at the Occupational Safety and Health Administration (OSHA) have been convened. Discussions about serious policy decisions between key agency officials and businesses within an affected industry are a real eye-opener for all participants. We strongly believe that the SBREFA panel process leads to promulgation of rules that often achieve the Agency's goals, avoid unnecessary regulatory burden on small business, without showing favoritism towards small business.

Other Agencies could benefit from such detailed analysis and consideration of small business issues, some more than others. While the SBREFA Panel process is still new and we continue to monitor its impact on the rulemaking process, it is possible to consider some of the lessons learned thus far and examine how this valuable process could be applied to other rulemaking agencies.

The Mine Safety and Health Administration promulgates regulations which greatly impact a number of small businesses and the SBREFA panel process would ensure that MSHA include small entities in their decision making process, in order to lessen the

regulatory burden on owners of small mines. Participation in the development of regulations is an important right of small businesses. MSHA recently has shown the kind of progress which can be made when they take into account small business concerns. MSHA recently published a Training rule, which was a result of MSHA being required to consider a version of the rule, drafted by producer members and trade organizations representing small business. Because MSHA was made to consider small business concerns with the initial draft, the rule which was eventually proposed was one in which both MSHA and the associations had reached a level of compromise. The proposed Training rule appears to meet MSHA's goal of ensuring adequate employee training in mines, while accommodating the employers need for flexibility.

Two MSHA rules in particular could have benefited from a SBREFA-like Panel process – the Noise rule and the Diesel Particulate Matter rule. Both of these regulations have small business organizations currently raising concerns which could have been addressed at the pre-proposal stage. If this had been done in both of these two proposals, current opposition and concerns about these rules could most likely have been lessened or eliminated.

Advocacy supports the inclusion of MSHA in the SBREFA panel process, but advises that current responsibilities already tax Office resources to the limit. You may be aware that since the early 1990's Advocacy personnel has been reduced by 25 percent, from 74 positions to 50. If Congress includes MSHA as a covered agency under the RFA, Advocacy will need at least one additional person and at least \$100,000 in economic analysis funding.

Our experience with the Panel process has shown that it has a number of benefits for the Agency, the small entities and the regulatory process as a whole. Critical data and analysis of the draft proposed rule is now made available at the pre-proposal stage so that small businesses may examine it and provide their actual experiences as they relate to assumptions and costs presented by the Agency. This causes the Agency to become more sensitive to potential small business issues when drafting the rule and preparing this analysis for the SBREFA panel. Following the Panel, the OMB 90 day review process takes into consideration concerns of the small entities and recommendations of the Panel prior to approving the proposal for publication in the Federal Register. Additionally, all Panel findings and recommendations become a part of the record, upon which small entities can challenge the Agency and its rulemaking.

SBREFA reaffirmed Congress' commitment to address small business concerns about regulatory and paperwork burdens objectively analyzed during the development of rules. The SBREFA Panel process is a valuable tool in addressing those concerns and is beginning to have an impact on the regulatory process at EPA and OSHA. The Office of Advocacy will continue to work hard with these agencies to ensure that the needs of the small business community and the mandates of SBREFA are met without compromising other public policy objectives. We look forward to a discussion of the value of extending this important process to other federal Agencies such as the Mine Safety & Health Administration.

Sincerely,

Jere W. Glover
Chief Counsel of Advocacy